Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–153 OF 1997

GOPAL SRI RAM, RAHMAH HUSSAIN JJCA AND VINCENT NG J

13 JUNE 2003

Civil Procedure *— Judgments and orders — Nullity — Whether proper to refer to orders made and judgments entered by a superior court of unlimited jurisdiction as 'nullities'*

Civil Procedure *— Judgments and orders — Setting aside — Order for sale obtained inter partes — Application to set aside made some eight years after order made — Whether application ought to be allowed*

Civil Procedure *— Judgments and orders — Setting aside, application for — Order for sale obtained inter partes — No opposition whatsoever raised to the making of the order — Application to set aside on the basis of a defective affidavit made some eight years after order was made — Whether application amounted to an abuse of the court's process*

Civil Procedure *— Rules of procedure — Breach of — Question judicial arbiter should ask in determining complaints of breach of procedural provisions*

The appellant executed a charge over some land in the respondent's favour in 1986. The appellant failed to make prompt repayment and the respondent instituted foreclosure proceedings in 1988. The originating summons claiming the appropriate statutory relief was duly served on the appellant. It entered an appearance and retained counsel who appeared on the date appointed for the hearing of the summons. No affidavit in opposition to the respondent's application was ever filed. Neither was objection taken as to the non-observance of any rule of court. On 5 April 1989, the High Court judge sitting in chambers granted the respondent an order for sale. On 19 March 1997 — some eight years after the order for sale was granted — the appellant took out a summons to set aside the order for sale. The High Court dismissed the summons and the appellant thus appealed to the Court of Appeal against the dismissal. The appellant submitted that the order for sale was invalid because the affidavit in support of the respondent's originating summons did not comply with O 83 r 3 of the Rules of the High Court 1980 ('the RHC'). It did not, submitted the appellant, state the amount due as at the date on which the High Court was being moved for an order for sale. The appellant's case was that O 83 r 3 of the RHC was mandatory in nature so that a failure to comply with its terms fatally flawed the order for sale. The appellant further argued that there was no discretion in the judge to refuse its application because the order for sale was a nullity and the appellant was therefore entitled to set it aside *ex debito justitae*, without the court going into the substantial merits of the case.

Held, dismissing the appeal:

(1) This was not a case where the impugned order was obtained ex parte the appellant. It was not an order made in default of the appellant's appearance. The order here was made inter partes. The appellant was very much present by its advocate at the hearing of the respondent's summons to foreclose. Applying the principles enunciated in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] MLJ 143 and *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393, the High Court had no power to grant the order sought by the appellant (see pp 326D–E, 327C); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] MLJ 143; *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393 followed and *Diamond Peak Sdn Bhd v United Merchant Finance* [2003] 2 MLJ 346 distinguished.

(2) It is wrong and misleading to refer to orders made and judgments entered by a superior court of unlimited jurisdiction as 'nullities'. They are not. Every superior court has power to set aside ex debito justitae default judgments and orders entered in breach of a rule of court or of practice. However, this is a far cry from terming such default orders and judgments as 'nullities'. Thus, the order for sale in the instant case was not by any stretch of the imagination a nullity (see pp 327I–328A); *Lee Tain Tshung v Hong Leong Finance Bhd* [2000] 3 MLJ 364 referred.

(3) In the instant case, the appellant entered an appearance to foreclosure proceedings, instructed counsel who attended the hearing in chambers and raised no opposition whatsoever to the making of the order. Nothing was said about the affidavit being defective. After the passage of some eight years the appellant came forward with the argument that the order was made on a defective affidavit and that it ought therefore to be set aside. The appellant's conduct amounted to an abuse of the court's process. If accepted, it would be an affront to justice (see p 328E–F).

(4) The courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. When a party to litigation complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is what injustice the party complaining has suffered by reason of the procedural breach. The answer to this question ultimately determines whether the court should uphold or reject a procedural complaint (see p 328G–H); *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329 followed.

(5) In the instant case, there was no form of injustice whatsoever occasioned to the appellant. The appeal was thus utterly devoid of

A merit and should be dismissed. The Court of Appeal affirmed the orders made by the High Court (see pp 329I–330A).

[Bahasa Malaysia summary

B Perayu telah memasuki satu gadaian ke atas beberapa bidang tanah bagi pihak responden pada tahun 1986. Perayu telah gagal untuk membuat bayaran balik dengan segera dan responden telah memulakan prosiding halang tebus gadaian dalam tahun 1988. Saman pemula yang menuntut relief statutori yang sesuai telah disampaikan ke atas perayu. Ia telah memasukkan kehadiran dan C melantik seorang peguam yang hadir pada tarikh perbicaraan saman tersebut. Tiada afidavit-afidavit bantahan terhadap permohonan responden difailkan. Tiada bantahan dibuat terhadap ketidakpatuhan apa-apa kaedah mahkamah. Pada 5 April 1989, hakim Mahkamah Tinggi yang bersidang dalam kamar telah memberikan responden satu perintah jualan. Pada 19 Mac 1997 — lebih kurang lapan tahun D selepas perintah jualan tersebut diberikan — perayu telah memohon satu saman untuk mengenepikan perintah jualan tersebut. Mahkamah Tinggi telah menolak saman tersebut dan perayu telah merayu ke Mahkamah Rayuan terhadap penolakan tersebut. Perayu telah menghujahkan bahawa perintah jualan tersebut adalah tidak sah E kerana afidavit sokongan kepada saman pemula responden tidak mematuhi A 83 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Ia tidak, seperti yang dihujah oleh perayu, menyatakan jumlah yang perlu dibayar pada tarikh yang Mahkamah Tinggi dipohon untuk satu perintah jualan. Kes perayu adalah di mana A 83 k 3 KMT adalah bersifat mandatori di mana kegagalan untuk F mematuhi terma-termanya akan menjejaskan perintah jualan tersebut. Perayu seterusnya berhujah bahawa hakim tiada budi bicara untuk menolak permohonannya kerana perintah jualan tersebtu terbatal dan perayu oleh demikian berhak untuk mengenepikannya *ex debito justitae*, tanpa perlunya mahkamah meneliti merit-merit penting kes tersebut.

G

Diputuskan, menolak rayuan tersebut:

(1) Ini bukan satu kes di mana perintah yang dipersoalkan telah diperolehi ex parte oleh perayu. Ia bukan satu perintah yang H dibuat disebabkan ketidakhadiran perayu. Perintah tersebut telah dibuat inter partes. Perayu hadir melalui peguambelanya di perbicaraan saman halang tebus responden. Dengan memakai prinsip-prinsip dalam *Hock Hua Bank Bhd v Sahari bin Murid* [1981] MLJ 143 dan *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393, Mahkamah Tinggi I tiada kuasa untuk memberikan perintah yang dipohon oleh perayu (lihat ms 326D–E, 327C); *Hock Hua Bank Bhd v Sahari bin Murid* [1981] MLJ 143; *Badiaddin bin Mohd Mahidin & Anor*

v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393 diikut dan *Diamond Peak Sdn Bhd v United Merchant Finance* [2003] 2 MLJ 346 dibeza.

(2) Ia adalah salah dan mengelirukan untuk merujuk kepada perintah-perintah yang dibuat dan penghakiman-penghakiman yang dimasuki oleh mahkamah atasan yang tiada had bidang kuasanya sebagai 'nullities'. Semuanya bukan begitu. Setiap mahkamah atasan diberikan kuasa untuk mengenepikan *ex debito justitae* penghakiman-penghakiman ingkar dan perintah-perintah yang dimasuki yang telah melanggar suatu kaedah atau amalan mahkamah. Namun begitu, ia jauh sekali dari menganggap perintah-perintah dan penghakiman-penghakiman ingkar tersebut sebagai 'nullities'. Oleh itu, perintah jualan dalam kes semasa tidak boleh dianggap sebagai terbatal (lihat ms 327I–328A); *Lee Tain Tshung v Hong Leong Finance Bhd* [2000] 3 MLJ 364 dirujuk.

(3) Dalam kes semasa, perayu telah memasuki satu kehadiran untuk prosiding halang tebus, telah mengarahkan peguam beliau yang hadir perbicaraan dalam kamar dan tidak menimbulkan apa-apa bantahan terhadap pembuatan perintah tersebut. Tiada apa-apa yang menyatakan bahawa afidavit tersebut adalah cacat. Selepas lebih kurang lapan tahun perayu telah mengemukakan hujah bahawa perintah tersebut berdasarkan satu afidavit yang cacat dan oleh demikian ia patut diketepikan. Perbuatan perayu membentuk satu penyalahgunaan proses mahkamah. Jika diterima, ia akan menghina keadilan (lihat ms 328E–F).

(4) Mahkamah-mahkamah mementingkan pengagihan kedua-dua keadilan prosedur dan substantif menurut merit sesuatu kes. Apabila satu pihak kepada litigasi mengadu tentang satu perlanggaran peruntukan prosedur oleh pihak penentang, persoalan utama bukanlah sama ada peruntukan tertentu tersebut dianggap sebagai mandatori atau arahan menurut terma-terma bahasa yang ia dituliskan. Persoalan yang betul yang patut ditanya sendiri oleh pemutus kehakiman adalah apakah ketidakadilan yang dialami oleh pihak yang membuat aduan oleh sebab perlanggaran prosedur tersebut. Jawapan kepada persoalan ini pada dasarnya menentukan sama ada mahkamah patut mengekal atau menolak satu aduan prosedur (lihat m 328G–H); *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329 diikut.

(5) Dalam kes semasa, tiada sebarang bentuk ketidakadilan dilakukan ke atas perayu. Rayuan tersebut oleh demikian tiada merit langsung dan patut ditolak. Mahkamah Rayuan mengesahkan perintah-perintah yang dibuat oleh Mahkamah Tinggi (lihat ms 329I–330A).]

Notes

For cases on the application for setting aside of judgments and orders, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3446–3454.

A For cases on breach of rules of procedure generally, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5200–5202.

For cases on nullity of judgments and orders, see2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3527–3528.

For cases on the setting aside of judgments and orders, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3351–3426.

B

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd [1998] 1 MLJ 393 (folld)

C *Diamond Peak Sdn Bhd v United Merchant Finance Bhd* [2003] 2 MLJ 346 (distd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] MLJ 143 (folld)

Lee Tain Tshung v Hong Leong Finance Bhd [2000] 3 MLJ 364 (refd)

Mokhtar bin Amin v Mohamed Moktar bin Omar [2001] 4 MLJ 329 (folld)

D

Legislation referred to

National Land Code s 257(1)(b)

Rules of the High Court 1980 O 83 r 3

E **Appeal from:** Originating Summons No 24(31)–885 of 1988 (High Court, Pulau Pinang)

Dato Mahinder Singh Dulku (*Harjit Singh* with him) (*Harjit Singh Sangay & Co*) for the appellant.

Teoh Soo Bee (*K Ahmad & Yong*) for the respondent.

F

Gopal Sri Ram JCA (delivering judgment of the court): This is the judgment of the court.

This appeal is directed against the order of the High Court in Penang whereby the appellant's application to set aside an order for sale was dismissed. The brief factual matrix against which this appeal rests is as G follows.

The charge which is the subject matter of the present litigation was executed as long ago as 1986. The appellant having defaulted in its obligation to make prompt repayment, the respondent bank instituted foreclosure proceedings in November 1988. The originating summons H claiming the appropriate statutory relief was duly served on the appellant. It entered an appearance and retained counsel who appeared on the date appointed for the hearing of the summons. No affidavit in opposition to the bank's application was ever filed. Neither was objection taken as to the non-observance of any rule of court. There was simply no resistance at all. So, on 5 April 1989, the judge sitting in chambers granted the bank the relief I sought. Then, the usual procedural steps were set in motion to have the land sold in public auction. Several attempts were made to sell off the land. But there were no buyers at each auction that was held. Then, on 19 March

1997, that is to say, some eight years after the order for sale was granted, the appellant took out a summons to set that order aside. The High Court dismissed that summons. The appellant has now appealed against that dismissal.

Only one ground was advanced in support of the appellant's application in the court below. It was repeated before us on Monday (9 June 2003) when we heard arguments on the appeal. It is that the order for sale is invalid because the affidavit in support of the originating summons did not comply with O 83 r 3 of the Rules of the High Court 1980 ('the RHC') in that it did not state the amount due as at the date on which the court was being moved for an order for sale. The appellant's case is that r 3 of O 83 of the RHC is mandatory in nature so that a failure to comply with its terms fatally flawed the order for sale. The argument goes that there is no discretion in the judge to refuse the appellant's application because the order for sale is a nullity and the appellant is therefore entitled to set it aside *ex debito justitae*, that is to say, as of right, without the court going into the substantial merits of the case.

Now, as a first step to deciding this appeal, it is essential that the principle applicable to the facts must be identified. To this end, it is important to notice a feature of this case that is of critical importance. This is not a case where the impugned order was obtained ex parte the appellant. It was not an order made in default of the appellant's appearance. The order here was made inter partes. The appellant was very much present by its advocate at the hearing of the bank's summons to foreclose. The principle applicable to the setting aside of such an order was set out by Chang Min Tat FJ in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] MLJ 143 at p 144:

> Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in O28 r 11 of the Rules of the Supreme Court 1957 (O 20 r 11 of the Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: Re St Nazaire Co 12 Ch D 88, *Kelsey v Doune* [1912] 2 KB 482; *Hession v Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v Peizer* 65 SJ 607.

Now, it is true that his Lordship uses the expression 'a judgment regularly obtained' in the passage above quoted. But, when the judgment is read as a whole, it is plain that the Federal Court when using that expression was referring to a judgment that was tainted by fraud or some other vitiating element and not a judgment that was merely irregular in the sense that it is one obtained in breach of a rule of court or of practice. As was made clear by Mohd Azmi FCJ in *Badiaddin bin Mohd Mahidin & Anor v Arab-Malaysian Finance Bhd* [1998] 1 MLJ 393 at p 409:

> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', *the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law.* The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception. (Emphasis added.)

Applying the foregoing principles to the present instance, we are of the view that the High Court had no power to grant the order sought by the appellant. Although the High Court decided the case on other grounds — grounds that were the subject of criticism before us — in our considered judgment, the order of the court below is amply supportable for the reasons we have stated a moment ago.

Learned counsel for the appellant placed much reliance upon the decision of this court in *Diamond Peak Sdn Bhd v United Merchant Finance Bhd* [2003] 2 MLJ 346 in support of his submission that neither long and inordinate delay nor the fact that the order for sale was made in the presence of the appellant's counsel could detract from the invalidity of the order occasioned by non-compliance with the mandatory provisions of O 83 r 3 of the RHC. We have carefully examined that case and find it readily distinguishable from the present. In *Diamond Peak*, the principal ground of complaint was the breach by the chargee of the mandatory provisions of s 257(1)(b) of the National Land Code. This court found this complaint to be entirely justified. It accordingly set aside the order for sale despite a delay of six years on the part of the chargor in making its application and despite the order having been made in the presence of the chargor's counsel. This is entirely in keeping with the principle enunciated by Mohd Azmi FCJ in *Badiaddin* and no difficulty is thereby occasioned. However, this court also relied on the chargee's failure to observe the mandatory requirements of O 83 r 3 of the RHC as an added reason for setting aside the order for sale. This was not a point strictly necessary for the outcome of the case on its merits. It is therefore pure obiter. Had counsel for the chargee brought the decision of the former Federal Court in *Hock Hua Bank Bhd v Sahari bin Murid* to the attention of the division of this court that heard *Diamond Peak*, the result may well have been different.

Before we conclude there are three matters that we think we ought to address as these are points relevant to the arguments addressed to us. First, throughout the argument in this case, counsel for the appellant kept referring to the impugned order for sale as a nullity. With respect, we cannot agree with this nomenclature. In our view, it is wrong and misleading to refer to orders made and judgments entered by a superior court of unlimited

jurisdiction as 'nullities'. They are not. Of course, every superior court has power to set aside *ex debito justitae* default judgments and orders entered in breach of a rule of court or of practice. But this is a far cry from terming such default orders and judgments as 'nullities' (see *Lee Tain Tshung v Hong Leong Finance Bhd* [2000] 3 MLJ 364, per NH Chan JCA). It follows that the order for sale in the present case was not by any stretch of the imagination a nullity.

The second point has to do with the effect of the delay of some eight years in the instant case. It was suggested by learned counsel for the appellant that an order obtained in breach or in non-compliance with the rules of court may be set aside at any time. With respect, in our view this is an untenable proposition. Were it otherwise, a litigant would be in a position to abuse a rule of court, oppress his opponent and thereby occasion an injustice. As this court observed in *Mokhtar bin Amin v Mohamed Moktar bin Omar* [2001] 4 MLJ 329 at pp 354–355:

> A rule of court, like any other provision, may be the subject of abuse. And it is the function and duty of the courts to be ever vigilant against this. An excellent example of a case of the prevention of an abuse of a rule of court is *Stewart Chartering Ltd v C & O Managements SA & Ors* [1980] 1 All ER 718. In that case, the chief clerk in the judgment room had declined to accept a default judgment form in the ordinary way. Robert Goff J however granted the plaintiff in that case leave to enter judgment in default despite the terms of O 13 r 6(1) [of the Rules of the High Court 1980]. He did so in order to prevent an abuse of the court's process.

Now let us take this very case. Here we have a situation where the defendant to foreclosure proceedings enters an appearance, instructs counsel who attends the hearing in chambers and raises no opposition whatsoever to the making of the order. Nothing is said about the affidavit being defective. Then, after the passage of some eight years it comes forward with the argument that the order was made on a defective affidavit and that it ought therefore to be set aside. In our view the appellant's conduct amounts to an abuse of the court's process. If accepted, it would be an affront to justice.

Lastly, there is the question of the modern approach to the breach of procedural provisions by a litigant. It is to be emphasized that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. So, when a party to litigation complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach? It is the answer to this question that will ultimately determine whether the court should uphold or reject a procedural complaint.

In *Mokhtar bin Amin*, this court held as follows (at pp 332–333):

> The modern approach towards procedural irregularities and the interpretation of what are usually considered to be mandatory or directory provisions is one

of greater flexibility than that adopted heretofore. It is exemplified by the following passage in the judgment of Lord Woolf MR in *R v Immigration Tribunal ex parte Jeyeanthan* [1999] 3 All ER 231. It is a case of the first importance. This is what the Master of the Rolls there said (at p 236):

> 'An examination of the relevant authorities, the leading textbooks and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see *Wade and Forsyth Administrative Law* (7th Ed 1994) p 255; *Supperstone and Goudie Judicial Review* (2nd Ed 1997) Ch 4 and *de Smith, Woolf and Jowell Judicial Review of Administrative Action* (5th Ed 1995) pp 265–271). Frequently the investigation involves doing no more than deciding the sense in which the word "shall" has been used as part of a particular procedural requirement. As the word "shall" is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance. Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement.'

After referring to the speech of Lord Hailsham of St Marylebone LC in *London and Clydesdale Estates Ltd v Aberdeen DC* [1979] 3 All ER 876, and quoting a passage therefrom, the Master of the Rolls continued as follows:

> 'Bearing in mind Lord Hailsham LC's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows: Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question). Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)
>
> Which questions arise will depend upon the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver.'

This, I think, is the approach that should be adopted by our courts. In my judgment, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

Having carefully examined the record of appeal provided to us, we have come to the conclusion that there was no form of injustice whatsoever occasioned to the appellant in the peculiar circumstances of the present case.

For the reasons already given, this appeal is utterly devoid of any merit. It is hereby dismissed. The orders made by the court below are affirmed. The appellant will pay the costs of this appeal to the respondent. Lastly, the security deposit paid into court shall be paid out to the respondent to account of its taxed costs.

Appeal dismissed.

Reported by Andrew Christopher Simon